The Solicitors' Journal

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CURRENT TOPICS

Legal Advice and the Voluntary Service

As a result of the postponement of the operation of s. 7 of the Legal Aid and Advice Act, 1949, damage has been done to the voluntary advice service, many centres having had to close down for lack of funds. It is the wish of the Council of The Law Society that surviving centres should continue to have the voluntary support of members. To facilitate this they have published, in the September issue of the *Law Society's Gazette*, practice notes setting out the conditions under which they are prepared to consider granting particular and general waivers of the Solicitors' Practice Rules, 1936. They are prepared to consider granting a waiver of r. 1, so as to enable a solicitor who gives his services without remuneration at a legal advice centre to accept instructions with or without reward, or to enable a solicitor who is in the salaried employment of a legal advice centre to accept instructions without further reward. Such a waiver may be general (i.e., in respect of all cases from a particular advice centre) or particular. The Council will grant such waivers if satisfied that it is in the interests of the persons to be advised; that it is not aimed at unfairly attracting business to a solicitor; that the solicitor undertakes to obtain the applicant's written assurance that he wishes the solicitor to act at the normal legal charges and that he has no other solicitor whom he would otherwise consult; and on various other conditions as to charges and prohibition of recommendations of particular solicitors. In certain conditions, waivers of r. 2, as to remuneration, will also be granted. Those who wish to continue their support of this good work are advised to study the details of these practice notes.

The Rent Tribunals

According to a *Daily Express* investigation conducted and reported by Harold Brett (*Daily Express*, 7th September) there is a growing demand for the abolition of rent tribunals. The main argument in favour of this "demand" according to the report is that a more straightforward way of providing people with homes at a fair price would be to let the builders build more houses. No doubt if, as we all wish, the building of houses is speeded up, the date when we shall be able to

"THE SOLICITORS' JOURNAL"
Change of Address, etc.

Readers are asked to note that on and from Thursday, 20th September, 1951, the Editorial, Advertising and Publishing Offices of THE SOLICITORS' JOURNAL will be removed to 102-103 Fetter Lane, London, E.C.4, to which address all correspondence for delivery after that date should be directed. The telephone number will be CHAncery 6855 and the telegraphic address OYEZ-FLEET London.

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dispense with such disagreeable expedients as rent tribunals will be brought nearer. The rest of the article is devoted to proving how disagreeable an expedient the institution of the rent tribunal is. The reductions of rent in two-thirds of the cases heard, the dispensing with the rules of evidence, the possible abuse of the power to hear cases in private, the fees payable to the members of the tribunal, the clerk's salary, the fact that no reasons are given for decisions and that there is no appeal, are a few of the facts marshalled in favour of abolition. There is one contention in the article which will not meet with general approval. The writer said: "But they have not eased the housing shortage. In two ways they have worsened it. They have undoubtedly scared many landlords and would-be landlords out of the letting business." Solicitors know that there has always been and still is activity in that part of the property market in which houses suitable for letting off in furnished rooms and flats are bought and sold. It would be interesting to learn if Mr. Brett's statement is supported by any evidence, statistical or otherwise. Notwithstanding occasional inevitable lapses, the tribunals do their work well, and Mr. Brett admitted that "they are conscientious in hearing both sides and inspecting premises." Reasonable rents have been fixed in thousands of cases, and that is obviously a social benefit. No other form of procedure would have suited an emergency where so much had to be done so quickly. Parliament decided, not without precedent, that there was a temporary crisis in which the ordinary form of legal inquiry could be curtailed. Provided that the politicians get down to the business of preventing it from becoming permanent we shall have to put up with the tribunals for the time being.

Probate Practice: Cost of Citation

AMONG the points of practice dealt with in the September issue of the *Law Society's Gazette* occurs a note that the Principal Probate Registry are taking steps to reduce the cost of the practice, commonly used where the spouse or next of kin of a deceased person cannot be found, of issuing a citation, advertising in the traditional form and applying to the court on motion for a grant to a person with an inferior title. The cost of the advertisement alone is over £40, and in future there is to be a shorter and less formal advertisement. The note states that, apart from this, it should be borne in mind that a registrar has a discretionary power to make an order under s. 162 of the Judicature Act (as amended) without citation if the estate is under £2,000, and before taking any steps to settle a citation it is worth while discussing such cases with the registrar. Other practice points on probate matters are dealt with in the directions recently issued by the Principal Probate Registrar and republished in the *Gazette:* (1) that a grant of probate will not be made in respect of the will of a domiciled foreigner unless the will is in the English language, and (2) that a colonial grant expressly limited to estate within the jurisdiction of the issuing court will not be resealed. The direction of 26th October, 1936 (Tristram and Coote, 19th ed., at p. 369), is cancelled.

The Legal Profession as a Court of Appeal

IT is not often that law periodicals as a class receive compliments or even have their functions properly appraised. For those who consider them merely as busmen's recreation, or, at a little higher level, as a means of keeping one's law up to date, it will be enlightening to quote a request, printed in the *Massachusetts Law Quarterly* for July, 1951, by Chief Justice QUA to the legal profession: "Our Court of Appeals is the legal profession. Our corrective influence comes from the practising lawyers of the Commonwealth, comes from the professors of law, comes from the writings in the law reviews in general and from actions of other courts, in passing on what we have done upon similar situations . . . it is my earnest hope that that influence will be brought to bear. . . . Anything that you can do will help us out in the performance of our duties. . . ." This is not mere gratuitous praise, but is the tribute of one who has received favour and hopes for favours to come. It is the duty of a judge to study current criticism of recent decisions, for approval by the majority of the profession is a solid basis on which confidence in the law may rest. Writers in the legal periodicals are grateful for this transatlantic tribute to the value of their work.

The Treasury and Bonus Issues

A LETTER from Sir Wilfrid Eady, of the Treasury, to Lord Kennet, chairman of the Capital Issues Committee, published on 6th September, stated: "As you know, the proposals set out in the White Paper on the control of dividends have the effect that companies raising money through an issue with a substantial bonus element may thereby get an advantage in respect of permitted dividend distributions as compared with companies raising money through an issue to the market. While the Capital Issues Committee has, of course, no responsibilities in the matter of the control of dividends, this is a consequence which we would clearly wish to avoid. I would therefore ask that the committee should examine all applications for the raising of money so as to ensure that the price proposed is fair and reasonable having regard on the one hand to the current values of existing shares and on the other to the need for making the offer sufficiently attractive to investors if it is to be a success." *The Times* City Notes of 6th September commented: "The upshot is plainly that the City is now right back to the position of 1946, when 'rights' issues appreciably below the market price were forbidden (before, that is, the ill-fated 'bonus issue duty' came and went). If past experience is a guide, there will be room and to spare for dispute between the Capital Issues Committee and directors of companies wanting to raise capital by 'rights' issues about what is a fair and reasonable price within the terms of this formula."

Taxation of Profits and the F.B.I.

A FIRST memorandum submitted by the Federation of British Industries to the Royal Commission on the Taxation of Profits and Income, published on 5th September, contended that in the higher classes of the Civil Service, in the professions, and in the arts there were other rewards for outstanding achievement, but in industry the reward must inevitably be mainly in the form of money income, and this had been very largely removed by the high marginal rates of income tax, including sur-tax. The outstanding defect in the present taxation of salaries and wages lay in the discrepancy between the average rate and the marginal rate, which was seriously aggravated by the high level of taxation. The Federation "strongly dissociated itself from the proposal of the Tucker Committee that the initial allowances for fixed capital expenditure should be perpetuated on a discriminatory basis." With regard to the taxation of business income originating overseas, the memorandum says it is deplorable that "it has been dealt with by the repressive measures embodied in the Finance Bill, 1951." The Federation attacked the profits tax as a disproportionate burden on company reserves and the ordinary shareholder. A second memorandum on more detailed questions is to be submitted before the end of the year.

SUMMARY JURISDICTION: SOME ACTS OF 1951

THIS article will briefly review some of the Acts passed this year. The Guardianship and Maintenance of Infants Act, 1951, increases the amount awardable by magistrates under the Guardianship of Infants Acts to 30s. per week for each child and allows proceedings under those Acts to be brought where the applicant or infant resides; the rights of adulterous wives as respects the maintenance of their legitimate children are also improved. The Fireworks Act deals with firework-manufacture, and the Dangerous Drugs Act and the Midwives Act are consolidation statutes. The Common Informers Act abolishes the right of private persons to sue for penalties under various Acts such as the Sunday Observance Act, 1780, and permits summary proceedings to be brought in lieu. The Criminal Law Amendment Act strengthens the criminal law as to procurers and the Fraudulent Mediums Act changes it as to spiritualist mediums, etc. Lastly, the Pet Animals Act requires pet shops to be licensed and forbids the sale of animals as pets by street-vendors and to children under twelve.

Where no date is given for their commencement, the Acts mentioned below are now in force.

The Guardianship and Maintenance of Infants Act, 1951

This Act (which was briefly noted at p. 506, *ante*) increases the amount awardable under an order made by a magistrates' court under the Guardianship of Infants Acts, 1886 and 1925, to 30s. per week and permits existing orders to be varied accordingly. It also remedies the difficulties caused by the case of *R.* v. *Sandbach Justices; ex parte Smith* (1950), 94 SOL. J. 597, by providing that proceedings for an order under the Guardianship of Infants Acts may be brought in a county court or magistrates' court for the place where the applicant or the infant resides as well as where the respondent or any of the respondents resides. If the respondent or any of them resides in Scotland or Northern Ireland, however, no English county or magistrates' court will have jurisdiction to make such an order unless a summons can be and is served on the respondent in England or the Maintenance Orders Act, 1950, s. 2, applies (see *ante*, p. 35). Section 4 validates existing orders made under the Acts of 1886 and 1925 by magistrates' courts for the areas where the applicants or infants resided which might otherwise have been deemed bad because of the *Sandbach* case (unless any such order has already been quashed for want of jurisdiction).

Another amendment introduced by the Act relates to wife-maintenance orders discharged because of her adultery after the order was made. If such adultery were proved, the court, while generally bound to discharge the existing order, could make a new order giving the custody of the children to the wife and requiring the husband to pay 10s. per week for each child of the marriage till the age of sixteen (Summary Jurisdiction (Married Women) Act, 1895, s. 7, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2). The new Act permits the weekly sum payable under any such fresh order (existing or future) to be increased to 30s. per week for each child and applies the Married Women (Maintenance) Act, 1949, s. 2, to such orders, so that the maintenance can be continued if the child is engaged in a course of education or training between the ages of sixteen and twenty-one. Magistrates' orders under the Guardianship of Infants Acts may be made to have effect anyhow until the child is twenty-one, but magistrates may not entertain an application under those Acts if the child is already sixteen.

The Fireworks Act, 1951

This Act comes into operation on 1st November, 1951. It provides for the testing and destruction of dangerous fireworks in a factory or magazine licensed under the Explosives Act, 1875, or in a store, as defined by that Act, and for the determination or amendment of the licences of factories where dangerous fireworks are made or where there is negligence in the manufacture or storing of fireworks. Section 5 requires fireworks or (in some instances) their containers to be marked with the name of the occupier of the factory and its address, and there are provisions (similar to those found in the Food and Drugs and Weights and Measures statutes) enabling the person responsible for the contravention to be brought before the magistrates where proceedings have been begun against someone else.

The Dangerous Drugs Act, 1951; *the Midwives Act*, 1951

The Midwives Act came into operation on 1st September, 1951. The Dangerous Drugs Act will come into operation on the day appointed for the coming into operation of the Dangerous Drugs (Amendment) Act, 1950, which, by a process of simultaneous legislative matricide, infanticide and parturition, it will forthwith repeal and re-enact. As both the 1951 Acts are expressed to be consolidation Acts and repeal the existing statutes, it is assumed that they make no material alteration in the law but, as the writer has little knowledge of the law as to midwifery (even less of the practice) and can confess to equally little knowledge of the law as to opium-eating, solicitors concerned with either subject are referred to the Acts themselves.

The Common Informers Act, 1951

The purpose of this Act sufficiently appears from its long title: "An Act to abolish the common informer procedure." Section 1 (1) provides that no proceedings for a penalty or forfeiture under any Act mentioned in the Schedule or under any local or private Act shall be instituted against any person after 22nd June, 1951, but s. 1 (3) (below) provides a liability to fine in lieu. The list of Acts mentioned in the Schedule begins with a statute of Edward III, and only one Act of this century is mentioned; apart from the Disorderly Houses Act, 1751, and the Sunday Observance Act, 1780, the statutory provisions mentioned in the Schedule are seldom met to-day. Section 1 also provides that proceedings on indictment or under the Summary Jurisdiction Acts, or where no part of the penalty is payable to a common informer, are not affected. Further, by s. 1 (3), persons who would have been liable under any of the scheduled Acts or under any local or private Act to a forfeiture or penalty at the suit of an informer are now liable, in lieu, to a fine of £100 on summary conviction.

While one effect of the Act, of course, will be to do away with the unpopular common informer, it also strengthens the hands of those who oppose Sunday entertainments, etc., on principle. Instead of having to proceed by action in the High Court (*Houghton-le-Touzel* v. *Mecca, Ltd.* [1950] 1 All E.R. 638 is a recent example), there is now the comparatively simple procedure of a magistrates' court, and the informant can no longer be met with the taunt that he is out to line his own pocket, since the fine will go into public funds.

The Criminal Law Amendment Act, 1951

The Criminal Law Amendment Act, 1885, created various offences in relation to procuring females for immoral

purposes, etc., but its provisions did not extend to certain such offences (under s. 2 (1), s. 2 (4) and s. 3 (2)) involving women of known immoral character, prostitutes, or those whose usual place of abode was a brothel. The new Act now provides, in effect, that it shall no longer be a defence to a charge for any such offence that the woman is of the type just mentioned, and so it will assist the suppression of the white slave traffic.

The Fraudulent Mediums Act, 1951

Section 1 of this Act provides that any person who—

(*a*) with intent to deceive purports to act as a spiritualistic medium or to exercise any powers of telepathy, clairvoyance, or other similar powers, or

(*b*) in purporting to act as a spiritualistic medium or to exercise such powers as aforesaid uses any fraudulent device,

shall be guilty of an offence punishable either summarily or on indictment. It must be proved, however, that the offender acted for reward, and no offence is committed under the Act if anything is done solely for entertainment. Proceedings cannot be taken without the consent of the Director of Public Prosecutions.

The Witchcraft Act, 1735 (see Archbold, 32nd ed., p. 714), is repealed; so is so much of s. 4 of the Vagrancy Act, 1824, as extends to persons purporting to act as spiritualistic mediums or to exercise powers of telepathy or clairvoyance, or who, in so purporting, use fraudulent devices. The relevant part of s. 4 (see Stone, 1951, p. 2390) deals with fortune-telling and using subtle crafts by palmistry, etc., to impose on other people.

This Act and the Criminal Law Amendment Act, 1951, will scarcely affect most practitioners, but should be noted by students. It is interesting to observe that the need for these two Acts and for the Common Informers Act was stressed in the recent book on "The Reform of the Law," by Professor Glanville Williams.

The Pet Animals Act, 1951

This Act comes into operation on 1st April, 1952. Section 1 forbids the keeping of a pet shop without a licence (renewable annually) from the borough, urban district, or rural district council. The maximum fee for the licence is 10s. The council must have regard to certain matters specified in s. 1 (3) (relating to the health of, and conditions of keeping, the animals), and appeal lies to a magistrates' court against their refusal to grant a licence or against its conditions. New offences created by the Act are keeping a pet shop without a licence, selling animals as pets in a street or public place (save from a stall or barrow in a market), and selling animals as pets to children under twelve. Section 4 gives to officers of local authorities power to inspect licensed pet shops. The keeping of a pet shop includes the carrying on at any premises (including a private dwelling) of the business of selling animals as pets and the keeping there of animals with a view to their being sold in the course of such business. A person shall not be deemed, however, to keep a pet shop by reason only of his keeping or selling pedigree animals bred by him, or the offspring of an animal kept by him as a pet, and there is also an exemption for what may be termed unsuccessful breeders of pedigree animals. The premises requiring to be licensed include a stall or barrow in a market.

G. S. W.

SECURITIES EXEMPTED WHILST IN THE HANDS OF NON-RESIDENTS

1. In order to attract foreign capital to this country during the continuance of the first world war, the Treasury was empowered by s. 47 of the Finance (No. 2) Act, 1915, to issue securities free of United Kingdom taxation, present or future, whilst such securities were owned by foreign residents.

The section expired on 31st August, 1922, but was re-enacted in slightly different form by s. 22 (1) of the Finance (No. 2) Act, 1931, on the occurrence of the financial crises of that year when the United Kingdom went off the gold standard.

During the past war the Treasury was further empowered by s. 60 (1) of the Finance Act, 1940, to modify the terms of issue as to such exemption from United Kingdom taxation, but this latter section has not up to the moment been acted upon.

Various securities were from time to time issued under both the first two sections referred to above, and those now subsisting and falling within the full exemption are:—

3½% War Loan 1952 or after, 3% Savings Bonds all issues, 4% Funding Loan 1960–90, 3% Defence Bonds all issues, 4% Victory Bonds, 2½% Defence Bonds both issues, 3% War Loan 1955–59, National Savings Certificates 7th, 8th, 9th and £1 issues, 2½% National War Bonds all issues *except* 1954–56, War Savings Certificates issued prior to 1st September, 1922.

In drafting s. 47 of the Act of 1915 the draftsman obviously had in mind income tax and the then super tax, to which there is no difficulty in applying it. It is not, however, so happily phrased when applied to death duties. The section reads as follows:—

"The Treasury may . . . issue any securities . . . with a condition that neither the capital nor the interest thereof shall be liable to any taxation, either present or future, so long as it is shown in manner directed by the Treasury that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom and securities issued with such a condition shall be exempt accordingly."

An attempt was made to deal with income and capital taxes separately in s. 22 (1) of the Act of 1931, which reads as follows:—

"Any securities issued by the Treasury under any Act may be issued with the condition that—

(*a*) so long as the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom the interest thereon shall be exempt from tax; and

(*b*) so long as the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom neither the capital thereof nor the interest thereon shall be liable to any taxation either present or future."

Still, however, the section was not happily phrased so far as death duties were concerned, for as Green's Death Duties, 2nd ed., at p. 632, points out: "Exemption 'so long as' the property is in a particular ownership is more appropriate to income tax than to death duties, which relate to a change of ownership." In fact, in the prospectuses the word "if"

was substituted for the words " so long as," but, it is submitted, this does not help very much.

However that may be, an " Estate Duty Office practice " grew up, quoted in all the text-books, admittedly not with approval but certainly without any doubts being cast upon it, which made the exemption workable so far as these duties were concerned.

" Domicile " was given its ordinary legal meaning, namely, a person's permanent home which he had no intention of ever changing and was in all cases a question of fact, which, under a Treasury direction, fell upon the Estate Duty Office to determine. " Ordinary residence " was again a question of fact, " ordinary " being taken as synonymous with " habitual," and, on the grounds that anyone could have more than one residence, a series of visits to this country, even under the compulsion of business or health, if made year after year and even for periods of less than six months, was looked upon as negativing the exemption.

On the other hand, it was conceded that " beneficial ownership " need not be sole and absolute ownership ; for on the death of a non-resident reversioner entitled to funds amongst which were any of such securities, subject only to a prior life interest or interests, the exemption was granted. This construction did not apply if the reversioner were entitled only to a fixed sum from the fund. The exemption was also granted on the death of a non-resident life-tenant without reference to the domicile and ordinary residence of the persons taking on the death. This was very convenient for the Revenue as the domicile of the deceased had to be proved for other purposes anyway, and it seemed the practical view, and from an administrative angle the only view, to take. Unfortunately, however, if an exemption from taxation is granted and it can be proved that a particular case falls without strain within the ordinary meaning of the wording of the statute granting it, exemption must follow.

2. To turn to the decisions of the courts on the interpretation of these sections :

(1) The first was decided in 1940 (*Re Demarest's Settlement Trusts* [1940] Ch. 661). A non-resident settled certain of these exempted securities on a resident and died within the statutory period, at that time three years. Counsel for the beneficiary endeavoured to argue that, as the claim for duty arose by reason of the gift within the statutory period (and in consequence the stocks were deemed to pass on the death by reason only of the gift), the gift should be ignored and the stocks should be looked on as passing still in the beneficial ownership of the deceased and not in that of the donee. The court would have none of this argument, however, and held that, as, on the facts, the stocks at the date of the death of the donor were undoubtedly in the beneficial ownership (in the ordinary meaning of the term) of a resident, both before and after the death, they did not fall within the exemption and were liable to duty.

This case was quoted in certain of the text-books as an authority for the proposition that it was the domicile and ordinary residence of the deceased life-tenant, in cases where the stocks were settled, which governed the exemption. It is respectfully submitted that it was nothing of the sort. All it did was to confirm that beneficial ownership need not be *absolute* ownership and depended on the actual facts of each case, given their everyday meaning.

(2) The second case was decided eleven years later, nearly thirty-six years after the first section was passed (*Re Smith* [1951] Ch. 360). The facts were simple. The life-tenant of certain foreign substantial settlements, herself a wealthy woman, died domiciled and ordinarily resident in England ; the remaindermen with one exception were domiciled and ordinarily resident abroad. The Estate Duty Office, following the official practice, claimed duty on the whole of the funds of these settlements situate in England irrespective of the exemption.

Counsel's argument for the plaintiffs was as simple as the facts : cause must precede effect. Death was the cause. The claim for duty and the passing to the remaindermen the effect. Therefore, when the claim for duty arose, the life-tenant was dead and the stocks could not be said to be in the beneficial ownership of somebody who was at that time dead and whose interest in them ceased on that death. In support he quoted the words of Chief Baron Palles, in an Irish case decided in 1908 but only reported in a note to [1922] 2 Ir. R. 208, who stated : " The two events—death and the passing of property—took place, in point of time, at the same moment, but in nature one preceded the other. The passing of the property was the effect of the death ; the death was the event on which it passed, and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognised principle of our law."

Counsel for the Commissioners argued that, as all the happenings were, from a practical point of view, simultaneous, one must look either forward or backward and that it was obviously the intention of the Legislature to look backwards. Otherwise the exemption in the case of a will or even a specific bequest would be unworkable, for it had been held in *Lord Sudeley* v. *A.-G.* [1897] A.C. 11 and *Corbett* v. *C.I.R.* [1938] 1 K.B. 567 that, at least in the case of a will, the estate was in the beneficial ownership of nobody until the residue was ascertained. Therefore if counsel for the plaintiffs was correct, the exemption could not apply in such a case and —here was the snag—it would then be a gross breach of faith.

Danckwerts, J., found for the plaintiffs and at once all was confusion. Practitioners found that they had for years been advising their clients wrongly, and duty might be payable where it was formerly thought it would not be ; the Treasury were worried about breaches of faith and the Estate Duty Office was appalled at the task of examining ten, twenty, thirty statements of domicile on any future death involving these securities, to say nothing of claims for wrongful payment stretching over the years. It was widely held that under the Finance Act, 1894, a payment made to the Estate Duty Office upon even a then accepted view of the law can become repayable if, at a later date, irrespective of any limitation as to time, such view is judicially held to be wrong, but this has now been altered by s. 35 of the Finance Act, 1951 (see p. 591, *post*).

The Commissioners appealed against the decision, but obviously something more positive had to be done, as, it is submitted, apart from the possibility of there being no beneficial owner when the charge for duty attached (an unpopular construction of the sections), the decision was itself good law. So by s. 34 of the Finance Act, 1951, it is enacted that :—

> " (1) Where the Treasury issue securities subject to any such condition as is authorised by Section 22 of the Finance (No. 2) Act, 1931, for an exemption from taxation so long as the securities are in the beneficial ownership of persons neither domiciled nor ordinarily resident in the United Kingdom, the condition so far as it relates to duties leviable on or with reference to a death shall be such as to operate by reference to the persons in whose beneficial ownership the securities are immediately before, not after, the death.

(2) This section shall be deemed always to have had effect, and to have applied for the purpose of Section 47 of the Finance (No. 2) Act, 1915, as it applies for the purpose of Section 22 of the Finance (No. 2) Act, 1931; and any condition subject to which securities have been issued by virtue of either of those sections before the passing of this Act shall be construed accordingly: Provided that any duty which, apart from this proviso, would be or have been leviable in accordance with this section in respect of any securities on or with reference to a death occurring before the 14th day of December, 1950, shall not be so leviable if no part of the duty was paid before that date."

It will be noted that the proviso saves the benefit of the decision in *Re Smith* in favour of the subject, as opposed to the Crown, and it may be that other cases on all fours with it may similarly claim exemption, provided always that the decision is not reversed on appeal. In view of the section, such appeal may not now be proceeded with. The application of the proviso must, however, be very limited.

In consequence, apart from this small exception, the Estate Duty Office practice has now the sanction of the Legislature, and it is to the domicile and ordinary residence of the *deceased* that one must look to ascertain whether or not the exemption is applicable.

Finally it is considered that the exemption, where appropriate, applies to uncashed dividend warrants and recoverable tax; while debts in this country are allowed *in toto* against other English assets. The exemption, however, does not apply in the cases of persons domiciled and ordinarily resident in Northern Ireland as the Government of Ireland Act, 1920, was not adapted and such persons are considered to be residents of the United Kingdom for the purposes of the exemption.

R. W.

MISREPRESENTATION BY AGENTS

Not the least interesting aspect of *Armstrong and Another* v. *Strain and Others* (reported *ante*, p. 318) is that Devlin, J., was able to expound in the form of a judgment an article which he had written in 1937 (53 L.Q.R. 344) after the decision of the Court of Appeal in *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.* [1936] 2 All E.R. 1039. That article provides an exhaustive review of the line of cases from *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358, onwards and should be referred to by anyone who wishes to trace the history of the controversy which, until the Court of Appeal decides otherwise, *Armstrong* v. *Strain* seems to have settled. The purpose of the present article is the much more modest one of examining the facts of the recent case, stating the result which it establishes and finally the propositions of law into which it fits.

In *Armstrong* v. *Strain* there were no less than six defendants, but the facts for our purposes may be simplified as follows. The first defendant S, an estate agent, owned a house which he had built in 1922. Since then, due partly to the nature of the soil and partly to extensive bomb damage, it had been necessary to underpin the structure several times, the last occasion being in 1949. Shortly afterwards S instructed U, his partner, to sell the house, but he said nothing about the underpinning, although it was apparently admitted that U did know of the last underpinning in 1949. U asked another firm of estate agents to assist in finding a purchaser and a partner, X, in that firm made a brief inspection of the house. Eventually the plaintiffs agreed to buy the house subject to contract. Before they actually signed the formal contract X, who also acted as surveyor for a building society from which the plaintiffs were hoping to obtain a mortgage, told them that there would be no difficulty in obtaining the amount they required because that was only a small percentage. A few days later U also told the plaintiffs that the house was "in a very nice condition." A day or two later the formal contract was signed, and shortly afterwards the plaintiffs took possession. After a fortnight slight cracks had appeared in the fabric, but the purchase was nevertheless completed. Shortly afterwards, however, the plaintiffs heard of the underpinning and soon further subsidence occurred which rendered the house completely beyond repair. The plaintiffs therefore began an action against the defendants for damages.

At the trial, Devlin, J., found as facts that neither U nor X was fraudulent, and that although their representations were clearly false, S had not deliberately kept them in ignorance of the true facts in the hope that a purchaser would be misled. If the latter could have been proved there is no doubt that S would have been liable in deceit to the purchasers. This principle, which was clearly stated by Rolfe, B., in *Cornfoot* v. *Fowke* (at p. 370), was applied by the Court of Appeal in *Ludgater* v. *Love* (1881), 44 L.T. 694, and has not since been questioned. The interest of the present case lies, however, in the fourth of the plaintiffs' allegations, namely that the knowledge of S must be imputed to his agents, U and X, and that together their representations were enough to constitute deceit.

It is noteworthy that the plaintiffs did not ask for rescission on the ground of innocent misrepresentation by U and X. Possibly they were advised that *Angel* v. *Jay* [1911] 1 K.B. 666, at any rate so far as conveyances are concerned, was not sufficiently shaken by the *dicta* of Denning, L.J., in *Solle* v. *Butcher* [1950] 1 K.B. 671, or it may have been that *restitutio in integrum* was no longer possible. Nor, particularly since *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, was there any chance of succeeding on the ground of a negligent misstatement.

Devlin, J., had therefore to decide whether *Cornfoot* v. *Fowke* was still good law. The facts of that case are well known. The owner of a house put it in the hands of an agent with instructions to let it. The person who eventually took the house asked the agent whether there was anything against it, to which the agent replied, quite innocently, "Nothing whatever." In fact, as the owner well knew, there was a brothel next door. On these facts the tenant claimed to resist an action for the recovery of rent, but it was held by a majority of the Exchequer Division that he could not do so. The owner had not authorised the statement, nor had he deliberately employed an innocent agent. *Cornfoot* v. *Fowke* was mentioned in many later cases, being approved in some, but criticised in more. Many of the criticisms, however, are of little interest since *Derry* v. *Peek* (1889), 14 App. Cas. 377, decided that in order to constitute deceit there must actually be an element of *mens rea*, as well as an untruthful statement. This put an end to the idea of "moral fraud" which had formed the basis of some of the earlier criticisms of *Cornfoot* v. *Fowke*. It is true that the opinions of two of the law lords in *Pearson* v. *Dublin Corporation* [1907] A.C. 351, were thought to have been adverse to *Cornfoot* v. *Fowke*, but the facts were different, the fraud, if any, being on the part of the agent. In *Armstrong* v. *Strain*, Devlin, J., was able to say that those

dicta, properly understood, were not adverse to *Cornfoot* v. *Fowke* at all.

The difficulty arose, however, in reconciling two later decisions, both in the Court of Apeal, the *Berkeley Property* case, *supra*, and *Gordon Hill Trust, Ltd.* v. *Segall* [1941] 2 All E.R. 379. The former apparently decided that a limited company, one agent of which gave certain untrue information to another of its agents, who passed it on innocently to an intending purchaser, was liable to that purchaser in deceit. That case is an unsatisfactory one because, even though it can be admitted that the first agent was acting within the scope of his employment, his evidence had to be taken on commission and it was not certain whether or not he was actually fraudulent in the *Derry* v. *Peek* sense. In the *Gordon Hill* case the Court of Appeal was faced with a vendor who had himself agreed to buy certain land under what was to all intents and purposes not a binding contract. He instructed agents to find a sub-purchaser, and it was found as a fact that they knew nothing of the peculiar terms of the contract. After the intending sub-purchaser had incurred certain expenses he discovered that the vendor might not be able to convey the land. He therefore sued the vendor for damages for deceit. The case was actually decided on the ground that the representation of the vendor that he could, or would be able to, convey was not false, but it was clearly accepted by Luxmoore, L.J., with whom the other members of the court agreed, that even if it were, the vendor and his agents had not between them been guilty of deceit. The law was taken to be as stated in *Cornfoot* v. *Fowke*, although the *Berkeley Property* case was apparently not cited. Luxmoore, L.J., after approving the statement of the law in Williams on Vendor and Purchaser, 4th ed., at p. 808, said (at p. 390): "I find it impossible to hold that the requirements of law with regard to the liability of the principal for a misrepresentation by the agent as laid down in *Cornfoot* v. *Fowke* had been fulfilled."

In *Armstrong* v. *Strain*, Devlin, J., came to the conclusion that these two cases were in direct conflict, and so he felt at liberty, on an examination of the earlier cases, to prefer the decision in the *Gordon Hill* case. He summed up the matter by adopting a sentence from his article, mentioned above: "There is no way of combining an innocent principal and agent so as to produce dishonesty."

The law regarding representations by principal and agent may therefore now be summarised as follows:—

(1) If P expressly authorises A to make a statement, false within the meaning of *Derry* v. *Peek*, he is liable in deceit, if an innocent person acts to his detriment on the strength of it. A is of course liable as a joint tortfeasor if he knew of the falsity.

(2) If P consciously directs his mind to the falsity but does not inform A of it, in the hope, as actually happens, that A will mislead an innocent person, P is again liable in deceit (*Ludgater* v. *Love*, *supra*).

(3) If it is A alone who knows of the falsity, P is nevertheless liable in deceit if A is acting within the scope of his employment (cf. *Lloyd* v. *Grace, Smith & Co.* [1912] A.C. 716).

(4) But if P, though actually aware of the falsity, does not at the time of instructing A direct his mind to it, he is not liable if A as a result misrepresents the position to an innocent person (*Cornfoot* v. *Fowke*; *Armstrong* v. *Strain*). If, however, it could be shown that subsequently P did direct his mind to the falsity, but nevertheless resolved not to say anything to A, there would presumably be liability as in (2), above (cf., e.g., *With* v. *O'Flanagan* [1936] Ch. 575).

E. H. D.

Procedure

VII—JUDGMENT ON ADMISSION OF FACT

JUDGMENT without trial can be entered in High Court actions in a variety of situations. We have already said something of Ord. 14, and we have not finished with it yet. Then there is judgment in default, either of appearance or defence, and judgment pursuant to an order on non-compliance by the opposite party, whether defendant or plaintiff, with some rule or direction, such as an order for interrogatories, discovery or inspection of documents (see Ord. 31, r. 21). Another, and perhaps rarer, instance is that provided for by Ord. 32, r. 6. By that rule "any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just." The case of *Lancashire Welders, Ltd.* v. *Harland & Wolff, Ltd.* [1950] 2 All E.R. 1096, may be taken as an illustration of the way this rule works and will, incidentally, amid the mild complexities of its history, give us the occasion for brushing up a few points relating to Ord. 14 procedure and to discretionary orders generally.

In particular, under this latter head, it emphasises a principle of great importance in procedural matters, namely, that where (as under most rules of Ord. 14 and Ord. 32, r. 6) the power of the judge is discretionary, the Court of Appeal or, for that matter, the House of Lords, will not interfere with the exercise of the judge's discretion "unless," as Cohen, L.J., says, "he can be shown to have gone wrong in principle, or, on the authority of *Evans* v. *Bartlam* [1937] A.C. 473, it can be otherwise established that injustice would be done if the order were allowed to stand." The main part of this proposition and the first exception to it are familiar enough; what is always interesting is to have an example of the case of a discretionary order being upset to avoid injustice. Indeed, this report embraces two such examples, for a hitherto unreported decision of *Contract Discount Corporation, Ltd.* v. *Overlyne Trading Co., Ltd.* (1947), which went the same way, is discussed in the judgment.

The claim by Lancashire Welders, Ltd., was for the balance of moneys due for work done for the defendants over a period; the amount, £31,000-odd. The writ was specially indorsed and an Ord. 14 summons was issued. In answer to that summons the defendants put in an affidavit admitting that a balance of £1,690 was due to the plaintiffs, and alleging that that sum had already been offered to the plaintiffs conditionally on its acceptance in full settlement. The offer was declined.

Now Ord. 14, r. 4, lays down a procedure where part of the plaintiff's claim is admitted, or where the defence set up applies to part only of the claim. In that event the plaintiff is to have judgment forthwith for such part of the claim as is admitted or not covered by the defence, subject to terms restricting execution, etc., the defendant being allowed to defend as to the balance of the claim. It appears

from the case of *Recenia R. Shaerf, Ltd.* v. *Smyth* [1936] 2 All E.R. 1622, that the plaintiff is in these circumstances entitled as of right to judgment for the admitted or undisputed part of the claim. Nevertheless, this procedure was not followed in the *Lancashire Welders* case. There the district registrar gave the defendants unconditional leave to defend as to the whole claim. Whether it was thought that there was a material difference between a case where the admission is as to a definite part of the claim and one where, on a running account, one party says that a certain sum is due and the other contends that the balance is in fact a smaller sum does not appear from the report. Certainly Cohen, L.J., did not see any such distinction as a relevant factor, for he refers to the order of the district registrar as *prima facie* a mistake. It may be recalled, too, that Lord Greene, M.R., said in *Contract Discount Corporation, Ltd.* v. *Furlong* [1948] 1 All E.R. 274: "I do not accept the proposition that in a case involving an account it would be improper to give summary judgment under R.S.C., Ord. 14, where a definite sum is admitted by the defendant, because that would mean that in respect of that sum he puts up no defence."

Unconditional leave to defend having been given, the next step, in accordance with the order for directions which is normally made in those circumstances, was the delivery of a defence. Exceptionally the master may order that the affidavit already filed in opposition to the summons for judgment shall stand as the defence. If a defence is ordered, though, there is no rule which fetters its terms by reference to the affidavit already on the file. As Cohen, L.J., points out, it would have been open to the defendants, notwithstanding the admission in affidavit, to plead in their defence a complete denial of liability. The only inconvenience would have been the virtual certainty of cross-examination on the inconsistency at the trial. In fact the defendants did slightly vary their defence when the formal pleading came to be delivered. They admitted by that document owing a sum of £1,750-odd—an increase of about £60 over the sum they were previously prepared to admit—and alleged facts raising a good defence as to the balance.

It was this defence which gave rise to the question under Ord. 32, r. 6, for the plaintiffs thereupon took out a summons asking for judgment on the admission relating to the £1,750, which the defendants had meanwhile lodged in court in full satisfaction. The district registrar and, on appeal, McNair, J., refused to order judgment.

In reviewing the proceedings below, the Court of Appeal referred to the decision in the first *Contract Discount* case (unreported) as bearing a very considerable similarity to the case before the court. The important difference between the two cases was that in the earlier case no admission was made until after unconditional leave to defend had been given. On the Ord. 14 summons all liability had been denied by the defendants. The fact that on the Ord. 14 summons in the *Lancashire Welders* case it would have been possible to order judgment for the amount then admitted, but that no such order was made, was a matter which McNair, J., below had thought important. The Court of Appeal did not think this factor had any real importance.

Several other points raised on behalf of the defendants were shortly dealt with in the judgment of Cohen, L.J. The defendants themselves looked forward to recovering judgment on the ground that they had paid into court all that was due. That point could be met by an appropriate order for costs. Then the issues as to the disputed balance were said to be common to the whole matter, so that it was not possible to decide them and leave aside the £1,750. The court remarked that there was no suggestion that, whatever the outstanding issues, the plaintiffs would not be entitled to the £1,750. Next, the claim was for £31,000 and the admission for only £1,750. Still, said the Court of Appeal, £1,750 is a very substantial sum. As their last contention, the defendants referred to the possibility that, because of the offer made before action brought, an order as to costs might be made favourable to them when the action came to trial. Again the Court of Appeal rejected this as an irrelevant consideration.

So much for the negative portion of the judgment. Positively, Somervell, L.J., had said in *Contract Discount Corporation, Ltd.* v. *Overlyne Trading Co., Ltd.*, that it was not *prima facie* just in the similar circumstances of that case that the plaintiff should stand out of the money in court, or take it out on condition of abandoning the balance. For those are the alternatives if the order is not made (see Ord. 22, rr. 1 and 2). Cohen, L.J., while voicing a warning that in matters of this kind one case cannot be regarded as an absolute precedent for another, puts his conclusion in *Lancashire Welders* in very similar language: "It seems to me that, if we allow the order to stand depriving the plaintiffs of the use of the £1,756 18s. 8d., which is admitted to be their money, we may be inflicting on them an injustice within the meaning of *Evans* v. *Bartlam*, and that we shall not be interfering with any of the principles applicable to discretion cases if we reverse the order of the learned judge and make the order which the plaintiffs seek."

J. F. J.

A Conveyancer's Diary

FINANCE ACT, 1951

THE only part of the Finance Act, 1951, which is of direct concern to the conveyancer *qua* conveyancer is Pt. IV, which deals with death duties, and fortunately this part of the Act contains only three sections, and the subject-matter of these sections is not of everyday importance. Section 33 provides exemptions from estate duty in connection with the preservation of property for the public benefit, s. 34 reverses the result of a recent decision on the exemption of certain Government securities from death duties while in foreign ownership, and s. 35 restricts the reopening of cases on the ground of mistake.

The provisions of s. 33 cover two distinct cases of property given for the public benefit. First, the exemption from estate duty already accorded in certain circumstances to property given to the National Trust is extended, and secondly, a similar exemption is accorded to houses and buildings of outstanding interest given to public or quasi-public authorities or institutions with a view to their preservation for the public benefit.

Some alleviation in respect of death duties on property given to the National Trust was first afforded by the Finance Act, 1931, whereby the Treasury was empowered to remit duties on property so given in certain cases. The first complete exemption from duties was provided by s. 37 of the Finance Act, 1937, which is still in force, and which forms the parent provision by reference to which subsequent extensions of this exemption have been conferred. The scheme of the 1937 section (as it is conveniently called in the present Act) was to grant exemption from death duties in respect of any estate or interest in land given or devised

to the National Trust in such a manner that the Trust becomes entitled indefeasibly to the property, and this exemption applies even if certain specified life interests in the property are reserved so as to postpone the interest of the National Trust in the property. The specified life interests are life interests of the donor or of a spouse or child of the donor, and where such life interests are reserved provision is made for the exemption from duty to correspond to the benefit of the National Trust in the property, as compared with the benefit accruing to any person entitled to a life interest therein, and for payment of duty in respect of the latter interest.

The exemption conferred by the 1937 section extended only to land and interests in land, but this exemption was extended by s. 31 of the Finance Act, 1949 ("the 1949 section"), to any other property given by a donor of land to the National Trust as a source of income for the upkeep of the land. As in the case of the 1937, and indeed of all, legislation on this subject, a gift for this purpose includes both a gift *inter vivos* and a gift by will.

The exemptions contained in the 1937 section and the 1949 section are now extended to certain chattels in three different cases:—

(*a*) A similar exemption is now available in the case of any objects ordinarily kept, at the time of the gift by any person of any land to the National Trust, in a building forming part of the land and given by that person with the land with a view to their preservation or use in the building. Objects exempted under this provision are deemed to form part of the building for the purposes of the 1949 section, i.e., property given for the upkeep of the land and exempt under that section can be applied also for the upkeep of such objects.

(*b*) A similar exemption is now also available in the case of the gift by a person to the National Trust of any objects ordinarily kept at the time of the gift in a building which is then inalienably vested in the Trust, with a view to the preservation or use of the objects in the building, provided that the donor of the objects is a person who either gave or joined in giving to the Trust the building in which the objects are ordinarily kept at the time of their gift to the Trust.

(*c*) The exemption conferred by the 1949 section in respect of property given to the National Trust as a source of income for the upkeep of land given to the Trust by the same donor is now extended to property given as a source of income for the upkeep of any objects which are at the time of the gift vested in the Trust and ordinarily kept in a building forming part of land which at such time is inalienably vested in the Trust. In this case, as in case (*b*), above, the exemption is not available unless the gift of the objects is made by a person who gave or joined in giving to the Trust the building in which the objects are ordinarily kept at the time of their gift to the Trust.

The second head of exemption is afforded by s. 33 (2), which provides that the Treasury may direct that the gift of a building to a Government department, a local authority or any other body not conducted for profit with a view to its preservation, if the building is one for the preservation of which, in the opinion of the Treasury, special steps should be taken by reason of its outstanding historic or architectural or æsthetic interest and the cost of preserving it, should be treated as falling within the provisions of the 1937 section and the 1949 section, and those sections will then apply to it as if references to the department or local authority or body, as the case may be, were substituted for references to the National Trust. The Treasury may require undertakings to be entered into for securing the preservation of the building and reasonable access thereto for the public before giving any such direction, and such undertakings are to be enforceable by injunction.

Section 34 of the Act of 1951 deals with the consequences of the decision in *Re Smith* [1951] Ch. 360. By s. 47 of the Finance (No. 2) Act, 1915, it was provided that the Treasury might, within certain time limits, issue securities with a condition that neither the capital nor the interest thereof should be liable to any taxation so long as it was shown that the securities were "in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom," and that securities issued with such a condition should be exempt accordingly. Similar provisions, but without the time limits laid down in the 1915 Act, were made by s. 22 (1) of the Finance (No. 2) Act, 1931. In *Re Smith* a testator gave certain securities issued under one or other of these provisions on trust for X for life with remainder to certain persons not domiciled or ordinarily resident in the United Kingdom. On the death of the life-tenant (who was resident in the United Kingdom) a claim was made for estate duty in respect of these securities. Danckwerts, J., held that duty was not payable on the ground that when the charge to duty arose the life-tenant was *ex hypothesi* dead, and the beneficial interest had then passed to persons not domiciled or ordinarily resident in the United Kingdom. The condition of exemption in both the 1915 Act and the 1931 Act, so far as it relates to duties leviable on a death, is now expressed to operate by reference to the persons in whose beneficial ownership the securities are immediately before, not after, the death, i.e., *Re Smith* is overruled. A fuller discussion of the background and effect of this provision appears at p. 586, *ante*.

Finally, s. 35 provides that any claim by or against the Commissioners of Inland Revenue for payment of additional estate duty or for repayment of excess of duty, as the case may be, shall in future be limited. On any such claim the question whether the amount of duty paid was the right amount shall, in so far as it appears that the payment and its acceptance were regarded as satisfying the claim for duty and were so regarded on a view of the law which was generally received or adopted in practice at the time, be determined on the same view of the law (subject to any express enactment to the contrary), notwithstanding that it appears from a subsequent legal decision or otherwise that the view was, or may be, wrong. Here is a completely novel provision, and while finality in winding up estates is a good thing, this investment of "the official view" on death duty matters with the force of statute law must, on general grounds, be regretted as another instance of authority passing from the courts to the executive.

"A B C"

OBITUARY

Mr. A. Francis Chamberlayne

Mr. Arthur Francis Chamberlayne, solicitor, of Bury St. Edmunds, died on 26th August, aged 72. The son of a London solicitor, Mr. Chamberlayne was admitted in 1904, and was for twenty-four years clerk to the Thingoe Rural District Council, an office from which he retired in 1946.

Mr. H. F. Wilson

Mr. Henry Francis Wilson, solicitor, formerly of Preston, died at his home at St. Mawes, Cornwall, aged 96. Admitted in 1881, he practised in Preston for more than fifty years and retired in 1935 on his eightieth birthday. He was for twenty years acting Under-Sheriff of Lancashire.

Landlord and Tenant Notebook

RENT DEFAULT AS A GROUND FOR POSSESSION

In *Dellenty* v. *Pellow* (1951), 95 Sol. J. 576 (C.A.), a statutory tenant appealed against an absolute order for possession granted in the following circumstances. The only ground on which the order had been made was that of non-payment of rent; the arrears had been paid into court before the hearing, or at all events before judgment; but the plaintiff proved that the defendant had been sued on similar grounds several times before the present action had been brought. The appellant, perhaps putting his case rather high, argued that it could never be reasonable to make an order for possession on the ground of non-payment of rent when the rent had been paid.

Such authority as exists suggests, however, that it was advisable to put the case that high, as it was stated as long ago as in 1931, by Slesser, L.J., in *Bellamy* v. *Wilson* [1931] E.G.D. 196, that such payment into court would not oust the power to grant an order; and more recently *Bird* v. *Hildage* [1947] 2 All E.R. 7 (C.A.) gave support to this view. In neither of those cases, however, was the "overriding requirement" of reasonableness invoked or gone into, though it is a matter which a county court usually considers without being asked to and should have considered in the first of the two cases mentioned. In *Bird* v. *Hildage*, in which an order had been refused, rent had been tendered before proceedings were commenced and it was held that this meant that no rent was "lawfully due" when the plaint was issued, which alone justified the county court judge in refusing an order (he thus having no jurisdiction to make one); but the report does go to show that a county court judge is entitled to take a poor view of a tenant who makes a habit of incurring arrears, and that an appellate court is not likely to interfere if discretion is exercised in the landlord's favour in such cases.

Indeed, it may be said that whatever wild ideas some controlled tenants may entertain about their security of tenure or irremovability, such as the notion that a landlord has got to find his tenant a place to go to and that it must be a replica of the premises claimed, most of them expect the right to remain in possession to be linked to the obligation to pay rent.

The argument advanced for the appellant in *Dellenty* v. *Pellow* invited the court to draw an analogy between the state of affairs before it and the position of a contractual tenant who has incurred a forfeiture by being late with his rent. How in such cases the tenant finally acquired a statutory right to relief on payment of rent and costs under (what is now) the Common Law Procedure Act, 1852, s. 212, is, of course, an old story. "The plaintiff [note that it was the plaintiff] seeks to be relieved against a forfeiture of this lease, which he states to have been incurred solely by non-payment of rent," said Sir William Grant, M.R., giving judgment in *Wadman* v. *Calcraft* (1804), 10 Ves. 67; proceeding with "and if that is the ground of this ejectment there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that, when the rent is paid, the end is obtained; and therefore the landlord shall not be permitted to take advantage of the forfeiture." To the same effect is a passage in a judgment delivered by Erskine, L.C., some two years later, in *Davis* v. *West* (1806), 12 Ves. 475, in which relief against forfeiture for rent default was compared and contrasted with relief against forfeiture on other grounds: "... it is the province of a Court of Equity to interfere, and give the relief against the forfeiture for breach of other covenants, as well as that for payment of rent; and the only distinction is that in the latter case it is considered so clear that the object of the clause for re-entry is only to secure the payment of the rent, that the legislature interposed and made it unnecessary to come into Equity; allowing the tenant upon the terms and within the time specified by the Act 4 Geo. II, c. 28, to stop the ejectment ..."

In so far as harsh and inequitable conduct can be equated with unreasonable conduct, it may well be that there are the beginnings of an analogy between the two positions. But the analogy breaks down when one comes to consider that in the one case the landlord is operating a contract, in the other merely claiming that the tenant has forfeited the protection given him by an Act of Parliament. In the recent case, indeed, Jenkins, L.J., said in his judgment that he was unable to follow the argument; the effect of the Rent Act was merely to suspend or restrict a landlord's right to possession of premises after the contractual relationship of landlord and tenant had ceased. Perhaps another way of putting it would have been this: if Parliament had meant the positions to be analogous, it could easily have expressed its wish by making para. (*a*) of Sched. I to the Rent, etc., Restrictions (Amendment) Act, 1933, read: "any rent lawfully due from the tenant (together with the costs of any proceedings taken, etc.) has not been paid at the date of the hearing, etc.," instead of "any rent lawfully due from the tenant has not been paid, etc."; for, as Cohen, L.J., held in *Bird* v. *Hildage*, *supra*, as the paragraph reads, the rights of the parties crystallise at the date of commencement of the proceedings by which the landlord is seeking to recover possession. (When the "alternative accommodation" ground is relied upon, the position is of course different; jurisdiction is not conferred by any conditions set out in the Schedule, but by s. 3 (1) (*b*) of the Act, which reads "the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect".)

The defendant in *Dellenty* v. *Pellow* had "a long history of default" and it must not, of course, be imagined that county courts will not, in ordinary cases, go on making suspended or conditional orders when non-payment is relied on. This without reference to the overriding requirement of reasonableness imposed by s. 3 (1), for the Increase of Rent, etc., Restrictions Act, 1920, s. 5 (2), provides the court with all the powers it may need to make such an order. Here, too, as the result of litigation, comparisons have been drawn and contrasts shown to exist between the position under these Acts and that obtaining when a tenant asks for relief against forfeiture; this was done in *Yates* v. *Morris* (1950), 94 Sol. J. 551 (C.A.); Evershed, M.R., observed that the two problems were similar but not the same; Singleton, L.J., that while the considerations differed, he would not like to think that the practice wholly differed. The decision was discussed in the "Notebook" at 94 Sol. J. 575. In *Dellenty* v. *Pellow*, of course, there was no point in making a suspended or conditional order, and the long-suffering plaintiff was perhaps lucky in having obtained all that was due to him and possession as well with far less effort than that expended by many landlords in such circumstances.

R. B.

HERE AND THERE

NOTE FROM KERRY

IN Belgium (I am told) the legal periodicals interrupt publication during the Long Vacation, though the law reports go on all the time. In England the break goes contrariwise. Well, anyone who may unaccountably happen to look in to see what this rather inconsequential little department is doing with itself is likely to find it neither here nor there, certainly more there than here (taking London as the reader's " here ") and by no means all there. Anyway, what would you write about for a parcel of English lawyers if you were taking a horse round the county of Kerry and had to catch to-morrow's post? The strangely foreign little town, or village rather, where I've halted has that particular unpolished " close to the earth " atmosphere, that unmistakable and (to the rural nose) delightful farmyard smell that you find all over the French countryside but never now in John Bull's own island, where the dominance of the urban outlook and the cult of what townspeople call a high standard of living have so thoroughly washed and brushed and polished and scraped the patina off the houses and the streets. You hear people say (if they are sensible) that they would rather have a house with a " lived-in " look than a showpiece of order and good management. Well, a little Irish village with its dusty hens pecking about the roadway, its haphazard gardens, its homely unvarnished shopfronts, the off-duty policeman in uniform sitting carelessly reading on the lawn, the quiet little bars left and right all the way down the broad, sloping, tree-lined main street give the place a " lived-in " look, more satisfying to anyone but a planner or a sanitary engineer than any antiseptic model township that I can readily recall.

ONE AT THE GROCER'S

YOU may or you may not agree with that part of the Irish outlook that feels in its bones that ultimately life is more than livers and that law is made for man and not man for the law, but if you are a human being something in you will experience an occasional twinge of sympathy with it. Have you never chafed, for instance, at that strange English docility in the face of the licensing laws? The contrast of the Irish attitude may well be one of your first impressions. It is Sunday and not opening time, but what does that matter? Someone known in the place (I am thinking at the moment of a little township two counties away) leads you up to the solid, respectable facade of an establishment that might be one of the local banks. A quick glance up and down the road; an imperceptible sign to a curtained window; the imposing door half opens; another rapid glance and no uniform in sight and a cheerful, prosperous old man admits you. He resumes his seat in the curtained parlour; you go into a spacious shop-room with a broad mahogany counter. Behind it are grocery-laden shelves and a severe, intelligent looking young man in horn-rimmed glasses who in a Roman collar might easily pass for the local curate. (Taking your drink at the grocer's is one of those minor mental adjustments that the stranger to the Irish way of life must make, for the " wicked grocer " of Chesterton's poem has no place in the national scene where the calling is enriched by a nobler practice.) At the counter a representative cross-section of the town's inhabitants, respectable and disreputable, is easily and naturally consuming large glasses of Guinness and perhaps doing a little after-church shopping. And how is it, you may ask, that the authorities have not noticed this interesting custom? Perhaps there's only one village policeman and he can't be everywhere? On the contrary, there are half a dozen, but, after all, there's more to life than interfering with established habits. They all have their bit of land to cultivate. It gives them plenty to occupy the time left over from routine duties, so why make trouble where no trouble is?

TINKER'S CUSS

THERE is no fretful " perfectionism " about the Irish. In England you know how worried the public-spirited and the public authorities get about the gipsies who will not fit into a prefabricated social framework and how, one way and another, they are always trying to edge them into it and merge them into the mass. Well, there are no gipsies in Ireland but their opposite numbers, the clans of wandering tinkers, with their own hierarchy of " kings," stand in much the same relation to law and order as our own gipsies did in Borrow's day. Horse-coping, living by their wits, fighting among themselves but not much interfering with others unless they are interfered with themselves, they are a law unto themselves. The women will fight each other horribly with nature's weapons, their children screaming and clinging to their skirts. The men, after the Irish instinct, will fight with weapons. In a public house in County Cork not long ago there was an epic battle over a horse-coping deal in which the local sweep was somehow involved, and he and the other combatants snatched up his metal-shod sticks and went at it with spectacular results. One of the parties well known locally as " Foxy Joe " was down on the floor with his enemies smashing at his head with the sticks when the police sergeant arrived and managed to get one of the most violent of the protagonists part of the way to the lock-up, when the hostile party started pushing him over the parapet of the bridge. With great courage the local baker siezed his legs and pulled him back when he was almost gone, and the fray eventually subsided. The whole affair was ultimately assessed at sentences for the more violent of something like two years. In another spectacular encounter one of the women dashing to the help of her husband accidentally stopped a blow with her head and expired. The verdict was not (as it almost might have been) suicide but it was another case for something like a couple of years. Pray do not imagine that all this is a typical cross-section of Irish life. The tinkers are an *imperium in imperio*, unofficially autonomous, to be interfered with as little as possible. The rest of Ireland goes its own way and, if you are not itchingly reformist, a very good way too.

RICHARD ROE.

JAPANESE ENEMY PROPERTY AND TRADE MARKS

The Board of Trade have made an order (the Trading with the Enemy (Custodian) (No. 5) Order, 1951) (S.I. 1951 No. 1626) which vests in the custodian certain enemy property and the right to receive certain moneys. The enemy property comprises certain securities and property existing by virtue of any will, settlement, trust, intestacy, contract or agreement. The moneys, the right to receive which is vested, comprise those payable in respect of the property referred to above and those payable in respect of securities already vested in the custodian, including proceeds of redeemed securities, drawn bonds, etc.

The order operates in respect of the property of and moneys becoming payable to the following—

the Japanese State or the sovereign thereof; any individual resident in Japan; any body of persons constituted or incorporated under the laws of Japan; any body of persons carrying on business in any place, if and so long as the body is controlled by any of the foregoing; as respects any business carried on in Japan, any individual or body of persons carrying on that business in Japan, and individuals (other than British subjects or British protected persons) of Japanese nationality resident in Germany, Bulgaria, Hungary, Roumania, Italy or Austria.

The order does not operate as respects property which has come into the ownership of any person by reason of any trade authorised under Trading with the Enemy legislation or money payable as a result of such authority, nor as respects property released or money repaid by a custodian.

The order came into operation on 7th September, 1951.

The Trading with the Enemy (Custodian) (No. 4) Order, 1951 (S.I. 1951 No. 1625), made on 5th September, 1951, similarly vests in the Custodian of Enemy Property all pre-war Japanese-owned trade marks registered in the United Kingdom register of trade marks. The vesting is without prejudice to the ultimate future of the marks and should not be read to mean that they will necessarily be expropriated.

REVIEWS

The Leasehold Property (Temporary Provisions) Act, 1951. Edited by S. SEUFFERT, of the Middle Temple and South Eastern Circuit, Barrister-at-Law, and G. AVGHERINOS, of the Middle Temple and Midland Circuit, Barrister-at-Law. 1951. London: Eyre & Spottiswoode (Publishers), Ltd. 10s. 6d. net.

This publication, though its price may be considered rather on the high side, covers the ground with great thoroughness. Dealing with the subject-matter section by section, the authors have spared no pains in their efforts to provide us with all the material we may need when it comes to understanding and applying, and arguing about, its various provisions. Numerous authorities decided on similarly worded provisions of other statutes are cited when occasion so requires; cross-references to other sections of the same Act are always given when necessary; and where, as for instance in the case of the definition of "shop," the statute resorts to the present-day habit of legislation by reference, the relevant provisions of the other Acts concerned (in this case ultimately two such) are set out and interpretative authorities cited. Undoubtedly a useful work to have at hand, whether engaged in advising or in advocacy.

Prideaux's Forms and Precedents in Conveyancing. Twenty-fourth Edition in three volumes. By J. B. RICHARDSON, M.A., LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. Vol. II, 1951. London: Stevens & Sons, Ltd.; The Solicitors' Law Stationery Society, Ltd. £4 4s. net.

The prevailing impression left by an examination of this volume of the post-war edition of "Prideaux" is that the late editor (whose recent and sudden death all who were acquainted with him or his work will greatly regret) approached his task of revision with almost excessive caution. So far as the actual precedents in any established collection are concerned such an approach is doubtless the only sound one. Experience has moulded the contents of such books, and the number of the forms they contain cannot be diminished without depriving the practitioner of his proved wants, or increased without turning a selective work into an incomplete encyclopædia. As for the language of the forms themselves, there is only one valid reason for tampering with settled precedents—the need to modernise a style that is excessively old-fashioned or (what is usually the same thing) verbose.

The forms in the previous edition of "Prideaux" were neither old-fashioned nor prolix, and in this volume they have rightly been left largely as they were. The only changes of importance in this respect have been due to legislation: the forms of tenancies of agricultural holdings and of minerals have been carefully revised, and the recent planning legislation has led to the addition of new forms covering matters arising thereunder for incorporation in leases and in mortgage instruments respectively.

But a substantial part of "Prideaux" consists not of precedents but of notes—the introductory notes to sections, which are really small treatises in themselves, and the mass of explanatory footnotes appended to individual precedents. About these notes there is no such sanctity as surrounds the precedents, and in his treatment of them the late editor's ultra-conservative tendencies cannot be wholeheartedly commended. There are too many omissions of significant matters which must be brought to the attention of the practitioner if an intelligent use is to be made of the precedents. For example, there is no mention of the control of borrowing legislation in the section on mortgages, and in the same section the effect of the important decision in *Knightsbridge Estates Trust, Ltd.* v. *Byrne* on redemption rights is nowhere properly explained. The new forms, already mentioned, for use in connection with the Town and Country Planning Act are not supported by any advice as to their use, and as some of these forms are similar and appear to cover the same ground there is a danger of duplication, if not worse, if the user is not already thoroughly acquainted with the problems which this Act has put before the conveyancer. *Hutton* v. *Watling* [1948] Ch. 398, is not mentioned on the subject of options to purchase in leases, nor is either *Re Wright* [1949] Ch. 729 or *Moat* v. *Martin* [1950] 1 K.B. 175, in connection with the construction of covenants not to assign. These omissions are all the more regrettable because when the late editor did revise or add to the existing notes, his views were sound and full of the common sense born of long experience in conveyancing practice (see, e.g., the view on the relative advantages of mortgage by demise and by legal charge on pp. 337–338, and the footnote on the latter page).

This volume is handsomely produced and strongly and attractively bound, and in general both publishers and printers can take pride in its appearance. But the substitution of general headings at the top of each page for the particular one which, in the previous edition, announced the contents of that page seems a retrograde step; and if it is desirable to change the Latin numerals appended to each precedent for Arabic in the "Contents" at the beginning of the volume, there seems no reason why the Roman numerals should be left to designate each precedent in the body of the book.

Planning Appeals. By HAROLD J. J. BROWN, LL.M., D.P.A., L.A.M.T.P.I., Barrister-at-Law, Assistant Editor of the *Journal of Planning Law*. 1951. London: Sweet and Maxwell, Ltd. 12s. 6d. net.

This little book should be in the library of every solicitor who may have to advise a client as to a planning appeal. It is well arranged and attractively written and produced, and has a good index.

The book is divided into two parts, the first treating of the right of appeal and procedure, and the second of the principles and practice in appeal decisions.

The author on pp. 9 and 10 refers to the right to make objections and representations to the Minister on various matters, e.g., development plans, tree preservation orders, or revocation orders under s. 21 of the 1947 Act. These, he says, are not strictly appeals to the Minister, and are accordingly outside the scope of the book, but broadly speaking, similar procedure applies at the inquiry. This is, perhaps, rather misleading. A development plan inquiry is a little complicated, but, generally speaking, in all these cases it is the local authority who present their case first and have the right of reply, whereas in planning appeals proper the reverse is the case.

The author rightly gives warning that many of the propositions into which he has arranged the considerations that have been deduced from decisions of the Minister so far reported must necessarily be of a somewhat tentative nature. However, they could not have been more clearly and concisely formulated and they accord entirely with the reviewer's experience; they form an excellent guide to anyone who is considering the best lines on which to fight an appeal. The propositions are supported by decisions of the Minister which have appeared in the "Bulletins of Selected Appeal Decisions," issued by the Ministry, in the *Journal of Planning Law* and in the *Estates Gazette*, page references to which are given to enable the reader to find fuller particulars. In considering the 1949 decision as to the use of a lock-up shop as a surveyor's, etc., office, on p. 38, the reader should bear in mind the revised definition of "shop" in the Use Classes Order, 1950.

One might perhaps have expected a reference to the Ministry's "Notes on the Siting of Houses in Country Districts," on pp. 72-75. It is a pity that there are no references to that valuable document, the "Progress Report on Town and Country Planning, 1943–1951," Cmd. 8204, though no doubt this is because the report was published too late for references to be made to it.

NOTES OF CASES

COURT OF APPEAL

COMPANY: SHARE PREMIUM ACCOUNT: DISTRIBUTION: CAPITAL OR INCOME

***In re* Duff's Settlement; National Provincial Bank, Ltd. *v.* Gregson**

Evershed, M.R., Jenkins and Birkett, L.JJ.
16th July, 1951

Appeal from Harman, J. (p. 284, *ante*).

A company issued from time to time shares at a premium which it transferred to a share premium account, in pursuance of s. 56 of the Companies Act, 1948. In 1950 the company passed a special resolution to pay out of the share premium account 2s. 6d. in respect of each fully paid share, and the court sanctioned this reduction. A number of shares was settled under several settlements of which the plaintiff bank was the trustee, and Harman, J., held that the money received by the trustee had to be treated as capital and not as income. The tenants for life appealed.

JENKINS, L.J., reading the judgment of the court, said that though s. 56 did not convert the share premium account into paid-up share capital, but merely made the provisions of the Act relating to paid-up share capital apply as if the share premium account were paid-up share capital, the section took the share premium account out of the category of divisible profit and prevented it from being distributed by way of dividend. This seemed to render the *ratio decidendi* of *Hill* v. *Permanent Trustee Company of New South Wales, Ltd.* [1930] A.C. 720, *In re Doughty* [1947] Ch. 263 and *In re Sechiari* [1950] 1 All E.R. 417 inapplicable. By the provisions of s. 56, the company was considered to have paid off notionally paid-up capital, and consequently the sum distributed must be deemed to have left the company as paid-up share capital returned to the members, not as distributable profit divided among the members by way of dividend. The provisions of s. 58 of the Companies Act, 1948, as to the creation of a capital redemption reserve fund on the redemption of redeemable preference shares, closely resembled those of s. 56. Although s. 58 reproduced s. 46 of the Companies Act, 1929, and had thus in effect been in force for twenty-two years, there appeared to have been no case in which the destination as between tenant for life and remainderman of a sum received in respect of settled shares on a cash distribution of a capital redemption reserve fund had been considered. The effect of s. 56 was to make a distribution of a fund representing share premiums equivalent in law to an actual return of paid-up share capital, and capable of being validly effected only through precisely similar reduction proceedings. Section 56 recognised the essentially capital character of premiums received on the issue of shares and gave effect to it by investing any distribution of the share premium account with the character of a capital distribution carried out by a notional reduction of paid-up capital. Appeal dismissed; leave to appeal to House of Lords.

APPEARANCES: *J. V. Nesbitt; R. H. Walton* (*Slaughter and May*); *H. Lightman* (*Peake & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

CHANCERY DIVISION

CHARITIES CLAIMING UNDER WILL: COSTS

***In re* Preston's Estate; Raby *v.* Port of Hull Society's Sailors' Orphans' Homes and Others**

Vaisey, J. 29th June, 1951

Adjourned summons.

By a will dated 28th June, 1948, the testator gave his residuary estate to his trustees "to pay the same unto the Widows' and Orphans' Fund of the Royal Merchant Navy." After the testator's death, which occurred on 17th January, 1949, his executors, having failed to find a charity the name of which corresponded to that named by the testator, wrote to six institutions asking whether they wished to make a claim. Five of them preferred claims and were joined as defendants to the summons; four appeared by counsel at the hearing.

VAISEY, J., said that not one of the institutions came anywhere near establishing a case. None of their names bore any similarity to the words used by the testator, and there was no ground for supposing that he had ever heard of any of them, or any of them had heard of him. The words imported a general charitable intent and a scheme had to be directed, as contended for by the Attorney-General, to give effect to that intent. The only difficulty was as to the costs of the application. Obviously, the costs of the executors, the next of kin and the Attorney-General had to be taxed as between solicitor and client and raised out of the estate in due course of administration. As regards the defendant charities, the position was different. These defendants ought to have discovered the hopelessness of their respective cases on perusal of the evidence filed in support of the summons. From that point onwards they were bound, if they wished to go on, to do so at their own expense and risk. These defendants were, of course, fully entitled to continue in support of their claim; the only question was whether other parties should be asked to pay for it. The matter had not yet been adequately considered in any reported case but reference had been made to this question in a paragraph in *The Times* of 14th January, 1932. An order would have to be made for the taxation as between solicitor and client and for payment out of the estate of the costs of the defendant charities up to and including perusal of the affidavit in support of the summons, but no order as to their subsequent costs would be made and they must bear those costs themselves.

APPEARANCES: *I. Campbell* (*Hyde, Mahon & Pascall*); *M. J. Albery* (*Robbins, Olivey & Lake*); *M. Berkeley* (*Whitfield, Byrne & Dean*); *G. H. Newsom* (*Darley, Cumberland & Co.*); *C. V. Rawlence* (*Lydall & Sons*); *J. A. Plowman* (*Langham and Letts*); *D. B. Buckley* (*Treasury Solicitor*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

MOTOR CAR: COVENANT NOT TO SELL WITHIN TWO YEARS: BREACH: MEASURE OF DAMAGES

British Motor Trade Association *v.* Gilbert

Danckwerts, J. 24th July, 1951

Action.

In January, 1951, the defendant purchased a new motor car from a member of the plaintiff association at a price of £1,263. He covenanted by a deed of covenant not to resell the car during a period of two years from the date of delivery. In breach of his undertaking he resold the car, and the plaintiffs claimed damages. According to the evidence, the car could be sold after two years probably for £2,500 and the defendant had offered it to a representative of the plaintiffs for £2,200; in an assumed free market its value would be £2,100.

DANCKWERTS, J., said that the covenant was not invalid on the ground that it was excessive and unreasonable. He (the learned judge) respectfully agreed with the decision of the Inner House of the Court of Session in *British Motor Trade Association* v. *Gray* (26th January, 1951, unreported) where the court upheld the former covenant which covered a period of one year; the extension of the period to two years did not alter that conclusion, particularly as it appeared from the evidence in the present case that the extension was made at the instance of His Majesty's Government. It was true that the fact that the scheme was sponsored by the Government was not conclusive for the purposes of the court, but it appeared to be a scheme made in the interests of the general public and of fair dealing, and in the interests of fair and reasonable trade. Accordingly, the objections to the validity of the deed failed. As to the measure of damages, the present surreptitious value of the car was £2,100. The plaintiffs contended that the proper measure of damages was the difference between the standard sale price and the notional free market price. That involved assessing the market value of the car on a basis which was contrary to the plaintiffs' policy and the provisions of the covenant. It also involved the application of an "open market" value which took no account of the special circumstances arising out of the plaintiffs' policy of resale. However that might be, in view of the authorities and the provisions of the Sale of Goods Act, 1893, s. 51, the court was bound to apply the rule that the measure of damages obtainable by the plaintiffs was the difference between the market value and the actual price to be paid in the ordinary way under the scheme of the covenant. Judgment for the plaintiffs for £836.

APPEARANCES: *G. T. Aldous* (*Osmond, Bard & Westbrook*) the defendant did not appear.

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

INFANTS: WARDS OF COURT: AMERICAN FATHER: LEAVE TO TAKE OUT OF JURISDICTION

***In re* Benner**

Vaisey, J. 17th July, 1951

Summons.

The husband, an American, had married the wife when he was stationed in England during the war. There were three children of the marriage, two daughters who, at the date of the hearing, were six and five years, and a son who was two years of age. After the conclusion of hostilities, the husband returned to America; he had acquired a small farm in Texas and could offer his family a good home in the United States and proper care. The wife lived with her parents, the children and other relatives in a Nissen hut; she was working on the land. The husband returned to England to fetch his family but the wife refused to go to America; differences arose between the spouses and the children were made wards of the court; the wife petitioned for a divorce on the ground of cruelty but the petition was dismissed; the husband was still willing to take the wife to the United States but she refused to go with him. The husband applied for the custody of the two daughters and for leave to take them to Texas; there was no dispute about the custody of the son.

VAISEY, J., said that the future of the children, while living with the wife, was unsatisfactory; they were living with her parents and looking to her father for support; and an unpleasant situation might later arise. The husband, on the other hand, had a family farm on which the children and the wife could live a fine open-air life. He (the learned judge) had formed the conclusion that the custody of the daughters should be granted to the husband. It was not right that the children of an American father, whose circumstances were as stated, should continue to live in England in charge of an impecunious mother while the father was offering the whole family a good home in the United States. The proper community to look after them was that of their father. There would be an order that the children should continue to be wards of court, and that the husband should have leave to take them out of the jurisdiction to Texas.

APPEARANCES: *Elliott Gorst* (*Upton, Britton & Lumb*); *D. J. Ackner* (*Rider, Heaton, Meredith & Mills*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

CENTRAL LAND BOARD: INTERVENTION AFTER LAND WITHDRAWN FROM SALE

Travis *v.* Minister of Local Government and Planning and Others

Devlin, J. 23rd July, 1951

Appeal under the Acquisition of Land (Authorisation Procedure) Act, 1946.

The appellant offered part of his land for sale at a price exceeding its existing use value to a prospective purchaser who wished to build himself a house on it. The Central Land Board, in pursuance of their policy of preventing sales of land at a price exceeding existing use value, informed the owner that, as the prospective purchaser wished to build a house for which development permission and a building licence were going to be granted, development might be hindered or prevented unless the land were made available at a price reflecting the fact that the purchaser would have to pay development charge to the board and that they had therefore instructed the district valuer to negotiate with the owner for its purchase. The owner replied by withdrawing the whole of his estate from sale. The board then made an order under the Town and Country Planning Act, 1947, s. 43 (2), for the compulsory purchase of the land. Thereafter planning permission was given in respect of the proposed building, and the Minister of Local Government and Planning confirmed the compulsory purchase order. The owner now appealed against the order of the board and the Minister's confirmation order. By s. 43 (1) of the Town and Country Planning Act, 1947, "The Central Land Board may . . . by agreement acquire land . . . in particular . . . for the purpose of disposing of it for development for which permission has been granted . . ."

DEVLIN, J., said that, assuming, which *quaere*, that the words in s. 43 (1), "for which permission has been granted," were referable to the time of acquisition of the land and not to the purpose of the acquisition, so that permission must have been granted at the time of that acquisition, acquisition of land was not effected by a compulsory purchase order and did not take place until a notice to treat had been served and consequential procedure observed after confirmation by the Minister of the compulsory purchase order. Accordingly the compulsory purchase and confirmation orders were not invalidated by the fact that planning permission was only granted after the making of the former order. The owner's second ground of appeal was based on the fact that the land had been withdrawn from sale before any compulsory purchase order had been made. But the power of the board to acquire land by compulsion to prevent its sale at a price exceeding existing use value involved their being empowered to intervene at any time before a proposed sale was completed. They were accordingly not prevented from intervening and acquiring the land by compulsion by the fact that the owner, on hearing of the board's proposed action, withdrew his offer to sell the land. That withdrawal was a matter going to discretion which might determine the board not to exercise their power of compulsory purchase, but it did not affect the power itself. The fact that the land had at one time been offered for sale at a price exceeding existing use value afforded material on which the board might conclude that it had been withdrawn from the market only temporarily, and on which, therefore, they might exercise their discretion to acquire the land by compulsion. He (his lordship) also rejected the appellant's argument that the fact that the land had been withdrawn from sale compelled the inference that the board were purporting to acquire it in pursuance of a policy of promoting the development of land, a policy declared in *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284; 95 SOL. J. 254, to be *ultra vires* the board; for the fact that it had once been offered for sale at a price exceeding existing use value was sufficient to justify the board's statement that their object in acquiring the land by compulsion was to prevent its sale at the excessive price in question. Appeal dismissed.

APPEARANCES: *C. N. Glidewell* (*Pritchard, Englefield & Co.*, for *Lloyd & Davies*, Manchester); *Sir Frank Soskice*, K.C. (A.-G.), and *J. P. Ashworth* (*Treasury Solicitor*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

City of London Traffic (Miscellaneous Provisions) Regulations, 1951. (S.I. 1951 No. 1600.)

City of London Traffic (Miscellaneous Provisions) and the London Traffic (Miscellaneous Provisions) (Revocation) Order, 1951. (S.I. 1951 No. 1597.)

Exchange Control (Payments) (Western Zones of Germany) Order, 1951. (S.I. 1951 No. 1588.)

Firemen's Pension Scheme (No. 3) Order, 1951. (S.I. 1951 No. 1584.)

Harrogate Water Order, 1951. (S.I. 1951 No. 1607.)

London Traffic (Festival of Britain) (Traffic Notices) (Revocation) Regulations, 1951. (S.I. 1951 No. 1601.)

London Traffic (Miscellaneous Provisions) Regulations, 1951. (S.I. 1951 No. 1598.)

London Traffic (Miscellaneous Provisions) (No. 2) Regulations, 1951. (S.I. 1951 No. 1599.)

Money Orders Amendment (No. 3) Warrant, 1951. (S.I. 1951 No. 1586.)

National Insurance (Industrial Injuries) (Benefit) Amendment (No. 3) Regulations, 1951. (S.I. 1951 No. 1606.)

National Insurance (Overlapping Benefits) Provisional Amendment Regulations, 1951. (S.I. 1951 No. 1605.)

Profits Tax Regulations, 1951. (S.I. 1951 No. 1589.)

Reserve and Auxiliary Forces (Notification of Standard Rent) Regulations, 1951. (S.I. 1951 No. 1587.)

These regulations prescribe the form of notice to be served by a landlord on the occupier of premises when it is desired to specify the amount which is to be the standard rent of premises if they should become the subject of a statutory tenancy by virtue of ss. 16, 17 or 18 of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951.

Retention of Cable, Mains and Pipe under Highway (Dumfriesshire) (No. 1) Order, 1951. (S.I. 1951 No. 1595.)

Rickmansworth and Uxbridge Valley Water Order, 1951. (S.I. 1951 No. 1609.)
Rubber Manufacturing Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1951. (S.I. 1951 No. 1608.)
Stopping up of Highways (Essex) (No. 7) Order, 1951. (S.I. 1951 No. 1604.)
Stopping up of Highways (Kent) (No. 7) Order, 1951. (S.I. 1951 No. 1603.)
Stopping up of Highways (Norfolk) (No. 3) Order, 1951. (S.I. 1951 No. 1585.)

NON-PARLIAMENTARY PUBLICATIONS

Ministry of Local Government and Planning Circular, No. 57/51.

This circular draws the attention of local authorities to the protection afforded to occupiers of dwelling-houses, being houses outside the existing forms of protection, by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951. It also deals with protection of superannuation rights of local government officials, and the rules as to payments to make up civilian pay whilst on service in H.M. Forces.

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 88-90 Chancery Lane, W.C.2, and contain the name and address of the subscriber, and a stamped addressed envelope.

Rent Restriction — AMOUNT OF RECOVERABLE RENT NOT READILY CALCULABLE OWING TO LOSS OF RECORDS

Q. A charity owns cottage property in a rural district. Four of the cottages were reconditioned in about 1930 by means of a grant under the Housing (Rural Workers) Act, 1926. Under these arrangements the maximum rent that could be charged was 4s. Since then the county council has stated that the rent can be put up to 6s. Owing, however, to an absence of records as to the previous rent and as to the amount spent on repairs, no increase has yet been made to the rents although it seems undoubted that the cost of the improvements would justify a rent of up to 6s. Recently other improvements have been carried out to the property which will justify an increased rent of slightly over 1s. 6d. per week. In this case the rent has got to be adjusted to pay for the improvements. So far as is known no notice to quit has ever been served in respect of any of the cottages and in consequence the tenants are all contractual tenants. Your advice is sought as to whether it is essential to serve notices under the Rent Restriction Acts to make any increase in the rents even if they are not brought up to the maximum. The difficulty in this case is that the records were probably destroyed through enemy action, although this is not certain. In consequence, it is difficult to give the requisite figures in respect of the increase of rent. In any case the trustees do not intend to charge the maximum. The case of *Mills* v. *Bryce* (1951), 95 SOL. J. 13, appears to apply in the case of rates, but possibly not in respect of increase owing to improvements.

A. The principle of *Mills* v. *Bryce* (1951), 95 SOL. J. 13, is that a statutory notice of increase is not required where the increased rent is less than the recoverable rent as defined by s. 16 (1) of the Rent and Mortgage Interest (Restrictions) Act, 1933. Where, as in the present case, the landlord is unable to ascertain the correct recoverable rent but is satisfied that the actual or proposed rent is not in excess of that recoverable under the Rent Acts, we consider that the correct course is to increase the rent by consent, i.e., by the creation of a new contractual tenancy, leaving it to the tenant to apply for a statement as to the standard rent under s. 11 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In reply the landlord should give such information as he reasonably can, leaving it to the tenant to apply to the county court under s. 11 of the 1920 Act and s. 6 of the 1933 Act for ascertainment and determination of the standard and recoverable rents. Alternatively, the landlord charity could themselves make an application under the last-mentioned sections.

Settled Land—DEVISE FOR LIFE OF FREEHOLDS CHARGED WITH ANNUITY—DEATH OF TENANT FOR LIFE—VESTING ASSENT

Q. A testator dying in 1917 devised certain freeholds, charged with an annuity to D who is still alive, to his son S for life and then to S's children as S should by will appoint. By a vesting assent in 1944 the testator's trustees assented to the property vesting in S upon the trusts of the will. S has recently died, having appointed by will the property to his son X. X now asks for an assent in his favour. It is assumed that the assent should be by S's executors. Should it be expressly subject to the annuity, and would it be wise to get X to indemnify the original testator's trustees against the annuity? In addition, S, owning freeholds in fee simple, has, by his will, devised them to one son, and for equalisation purposes has charged the property with the payment of an annuity in favour of another son. Should the assent be subject to the newly created annuity?

A. As the annuitant whose benefit is charged on the land is still alive at the death of the tenant for life, S, the land remains settled land by virtue of s. 1 (1) (*v*) of the Settled Land Act, 1925 (*Re Bird* [1927] 1 Ch. 210). Accordingly the trustees of the settlement should obtain a grant of probate of the will of S limited to settled land. X is entitled to a vesting assent from the trustees of the settlement as special personal representatives of S in his favour by reason of being a person having the powers of a tenant for life (Settled Land Act, 1925, s. 20 (1) (ix)) and the legal estate will be vested in him as statutory owner. He will be expressed to hold it upon the trusts of the settlement and no specific mention of the annuity is necessary. No indemnity is required since the trustees are not personally liable for the payment of the annuity, which can be recovered by D out of the rents and profits by the appointment of a receiver or otherwise, should X fail to pay the annuity. Similarly, in the case of the freeholds devised by the will of S, these will be settled land and the general personal representatives of his will should execute a principal vesting assent in favour of the devisee, who will hold them as statutory owner on the trusts of the settlement created by the will of S.

Change of Children's Names without consent of Divorced Father

Q. On a divorce no order was made as to custody of the children of the marriage, but as a matter of convenience the wife retained custody and the husband makes voluntary payments for their maintenance. Is the wife able, without the husband's consent, to change the surname of the children to that of her own maiden name, or on re-marriage to that of her second husband? Would the answer be the same if custody had been granted to the wife?

A. The children can certainly acquire the new names by reputation, i.e., by simply assuming the name and inducing others to use it also (cf. *Dancer* v. *Dancer* [1948] 2 All E.R. 731). It is doubtful whether a deed poll would be effective if executed only by a mother who had not the custody under an order or a binding agreement, the father being alive. The consent of the father would be necessary. If custody had been given to the wife by order, then she could execute the deed on behalf of the child, and it could be enrolled in the Central Office. In that event also, a change of name by the mother, whether by deed poll, or by simple assumption, or on marriage, would probably be sufficient to initiate a change by reputation in her children's names.

Surety's Liability under Administration Bond

Q. The printed form of administration bond in use contains three distinct requirements to satisfy the bond, namely, that the parties to it do, when lawfully called upon, see that the administrator(s) (1) cause to be made a true and perfect inventory of the estate coming into the possession or knowledge of the administrator(s); (2) well and truly administer the estate according to law; (3) cause to be made a true and just account of the administration. There appear to be very few decided cases (none recently) on the subject of a surety's liability under an administration bond. It is assumed that the liability ceases when the administration is completed and the estate handed over to the beneficiaries entitled. What, however, is the position when, under an intestacy, there is a life or minority interest; would the obligation extend beyond the actual administration into the period of trusteeship of the fund, assuming the same administrators continued as trustees?

A. So far as we have been able to discover there appears to be no limit to the duration of the liability of sureties under the administrator's bond beyond that set by the performance of the administrator's duties as set out in the oath and bond, the protection afforded by the Statutes of Limitation and the statutory advertisements under the Trustee Act, 1925 (as to which see *Newton* v. *Sherry* (1876), L.R. 1 C.P. 246), and the duration or their natural lives; even as to the latter contingency the sureties are expressed to bind their heirs, executors and administrators. We do not consider that the sureties are released by reason of the administration becoming a trusteeship, but their liability continues until the estate has been fully administered and distributed to the persons ultimately and beneficially entitled. This seems to follow from *Dobbs* v. *Brain* [1892] 2 Q.B. 207, where the sureties were held liable for the default of an administratrix who had failed to retain a legacy due to a minor and instead had paid it to a relative who absconded, and also from the words of s. 167 of the Judicature Act, 1925, which prescribe the requirements of an administration bond "conditioned for duly collecting, getting in and administering the real and personal estate of the deceased." Indeed, these words would not appear to limit the liability of the sureties to the lifetime of the administrator, and their responsibility would appear to continue after the appointment of new trustees, although here it might be possible for them to say that s. 42 of the Administration of Estates Act, 1925, afforded them protection.

NOTES AND NEWS

Honours and Appointments

The King has appointed Mr. THEOBALD RICHARD FITZWALTER BUTLER to be deputy chairman of the Court of Quarter Sessions for the County of Nottingham with effect from 13th August, 1951.

Lt.-Col. ERIC CYRIL BOYD EDWARDS, J.P., LL.B., M.C., solicitor, of East Ham, has been appointed chairman of the Juvenile Bench of Rochford Petty Sessions.

Personal Notes

Miss Evelyn M. Shellabear, deputy justices' clerk to Dorchester borough and county magistrates, is shortly taking up an appointment in private practice in Basingstoke.

Miscellaneous

DEVELOPMENT PLANS

COUNTY BOROUGH OF BURNLEY DEVELOPMENT PLAN

The above development plan was on the 31st August, 1951, submitted to the Minister of Local Government and Planning for approval. It relates to land situate within the County Borough of Burnley. A certified copy of the plan as submitted for approval has been deposited for public inspection at the Central Library, Grimshaw Street, Burnley, and is available for inspection free of charge by all persons interested between the hours of 10 a.m. and 7 p.m. on Mondays and Tuesdays and from Thursday to Saturday inclusive, and between the hours of 10 a.m. and 12.30 p.m. on Wednesdays.

Any objection or representation with reference to the development plan may be sent in writing to the Secretary, Ministry of Local Government and Planning, 23 Savile Row, London, W.1, before the 15th October, 1951, and should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the Town Clerk of Burnley and will then be entitled to receive notice of the eventual approval of the plan.

COUNTY BOROUGH OF ST. HELENS DEVELOPMENT PLAN

The above development plan was on the 30th August, 1951, submitted to the Minister of Local Government and Planning for approval. It relates to land situate within the County Borough of St. Helens. A certified copy of the plan as submitted for approval has been deposited for public inspection at the Town Clerk's Office, Town Hall, St. Helens, and is available for inspection free of charge by all persons interested between the hours of 9 a.m. and 5 p.m. on Mondays to Fridays and 9 a.m. and 12 noon on Saturdays.

Any objection or representation with reference to the plan may be sent in writing to the Secretary, Ministry of Local Government and Planning, Whitehall, London, S.W.1, before the 28th October, 1951, and should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the County Borough of St. Helens and will then be entitled to receive notice of the eventual approval of the plan.

£1,000 MILLION FOR WAR DAMAGE

The War Damage Commission have paid out £1,000,000,000 since April, 1941, when they made the first payment. War damage contributions by property owners to the Government total £198,000,000.

During the war some 3,420,000 buildings in Great Britain and Northern Ireland were damaged or destroyed by enemy action, including 3,160,000 houses. Over 40 per cent. of the buildings were in the Greater London area.

Individual payments amount to £689,000,000—£475,000,000 for the cost of repairs done and £214,000,000 representing the loss in value where war damage repairs would have been uneconomic or undesirable. In addition, £270,000,000 has been paid to local authorities for the repair of houses and for site clearance, and the remaining £41,000,000 to the Ministry of Works for the repair of houses and for public utility undertakings and roads.

Of the total payments, £705,000,000 was for houses, £84,000,000 for factories, £67,000,000 for commercial buildings such as warehouses, £37,000,000 for shops, £24,000,000 for offices, £12,000,000 for hotels and licensed premises and £8,500,000 for churches. Greater London's share of the payments represents about 60 per cent.

During 1948 £149,000,000 was paid, in 1949 £105,000,000 in 1950 £92,000,000 and for the first six months of 1951 £39,000,000. Payments are at present being made at the rate of about £1,250,000 a week.

SERVICE AT WESTMINSTER ABBEY

MONDAY, 1st OCTOBER, 1951

On the occasion of the re-opening of the Law Courts a Special Service, at 11.45 a.m., will be held in Westminster Abbey, at which the Lord Chancellor and His Majesty's judges will attend.

Barristers wishing to attend the service should notify the Secretary of the General Council of the Bar not later than Wednesday, 26th September.

Barristers attending the service must wear robes. All should be at the Jerusalem Chamber, Westminster Abbey (Dean's Yard entrance), where robing accommodation will be provided, not later than 11.30 a.m.

The South Transept is reserved for friends of members of the Bar and a limited number of tickets of admission are available for issue. Two of these tickets will be issued to each member of the Junior Bar whose application is received by the Secretary of the General Council of the Bar, 2 Stone Buildings, Lincoln's Inn, W.C.2, not later than Wednesday, 26th September.

King's counsel wishing to obtain tickets for friends should apply direct to Mr. John Hunt, Crown Office, House of Lords, S.W.1.

Ticket-holders must be in their seats by 11.35 a.m.

No tickets are required for admission to the North Transept which is open to the public.

FRANK SOSKICE,
Attorney-General.

10th September, 1951.

Wills and Bequests

Mr. R. Bolton, solicitor, of Bolton, left £83,325 (£82,339 net).

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Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).